

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

76-4268

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NIAGARA UNIVERSITY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND CROSS-APPLICATION TO
ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

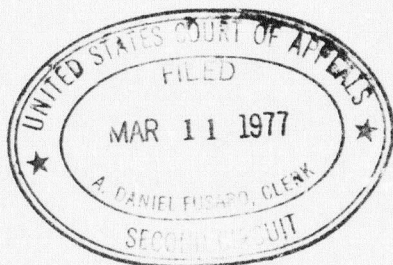
BRIEF ON BEHALF OF PETITIONER NIAGARA UNIVERSITY

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ON PETITION FOR REVIEW AND CROSS-
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THE NATIONAL LABOR RELATIONS BOARD

BRIEF ON BEHALF OF PETITIONER
NIAGARA UNIVERSITY

ISSUES PRESENTED FOR REVIEW

1. Whether the Order of Respondent, the National Labor Relations Board [the "Labor Board"], that Petitioner, Niagara University [the "Employer University"], bargain with respect to a unit of full-time faculty members from which the Labor Board has excluded full-time faculty members who are members of a religious order is arbitrary and unreasonable.

2. Whether the Labor Board may rule that full-time faculty members who belong to a religious order may not be included in a unit of full-time lay faculty members, where the Labor Board has recognized that there is "no statutory or other

overriding policy consideration [which] exists precluding such inclusion," and where the Niagara University Lay Teachers Association (the "Lay Teachers Union") has agreed that "if the National Labor Relations Board were to find as an appropriate unit a group of faculty that included religious...[it would] then also admit those religious to membership."

3. Whether the Labor Board was arbitrary and unreasonable in excluding from a unit of full-time faculty members at the Employer University, other full-time faculty members who, in similar situations before the Labor Board, have been held to have a community of interest with those included within the unit.

4. Whether the Labor Board may obtain enforcement of an Order to bargain with respect to a certified unit where, subsequent to the issuance of its Order (and subsequent to the filing of the Employer University's Petition for Review), the Labor Board changes the unit certification to conform in part to the unit objections raised by the Employer University before the Labor Board and in its Petition for Review to this Court.

STATEMENT OF THE CASE

This case is before the Court upon a Petition of Niagara University, the Employer University, to Review and Set Aside a Decision and Order of the Labor Board issued on November 17, 1976, and reported at 226 N.L.R.B. No. 154 [A. 26a]*, and upon a Cross Petition of the Labor Board to Enforce its Order. The Decision and Order were rendered by Betty Southard Murphy, Chairperson of the Labor Board, and John H. Fanning and John A. Penello, members of the Labor Board. The Labor Board's decision is predicated upon a finding that the Employer University unlawfully refused to bargain with the Lay Teachers Union. This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act, [the "Act"], 29 USC §160(f).

The Employer University admits that it refused to bargain with the Lay Teachers Union which had prevailed in the representation election, but denies that such refusal to bargain was unlawful. Accordingly, the Labor Board has charged the Employer University with a refusal to bargain which has led to this proceeding. It is the Employer University's position that the Labor Board improperly certified the Lay Teachers Union in the underlying representation case proceedings

* References to the Joint Appendix shall be designated "A." References to the transcript and joint exhibits in the underlying representation case [3-RC-6410] shall be designated as "RC Tr." and "RC Jt. Exh." respectively. References to the transcript in the Clarification proceeding [Case 3-UC-104] shall be designated "UC Tr."

[Case No. 3-RC-6410], by virtue of the Labor Board's exclusion of all full-time faculty members who are "religious faculty" viz., full-time faculty who are members of religious orders.

Significantly, more than one week after the Petition for Review had been filed in this Court, and eight months after the Employer University requested clarification, the same panel of the Labor Board which issued the refusal to bargain decision rendered a decision pursuant to the requested clarification [227 N.L.R.B. No. 33 (1976), A. 39a-47a]. In that decision [the "Niagara U. C." decision or case], the Labor Board constricted the offensive phrase "religious faculty" to "religious faculty who are members of the Congregation of the Mission, Eastern Province" [A. 47a].

THE COURSE OF THE PROCEEDINGS AND
THE DISPOSITION BY THE LABOR BOARD

Since the course of the proceedings before the Labor Board has a unique bearing upon both the substantive and procedural aspects of this proceeding, we will deal with them at length.

On August 21, 1975, the Lay Teachers Union filed a petition for certification of a unit of full-time faculty members excluding "all faculty who are members of religious orders" [A. 1a]. On October 3, 1975, subsequent to a representation hearing, the Regional Director of the Third Region of the Labor Board issued his decision directing an election of all full-time

faculty members of the Employer University but excluding "religious faculty" [A. 2a]. This decision, excluding "religious faculty" from the unit, was denied review by the Labor Board on November 20, 1975, by a two to one vote [A. 7a].

As a result of the decisions of the Regional Director and the Labor Board, four of the twenty-one full-time religious faculty were permitted to vote subject to challenge [A. 5a, 7a]. Included in the group of four religious faculty members who were allowed to vote subject to challenge was Father Lachowski, who is also a Vincentian priest, but from the New England Province, and Sister Gilman, who is a member of the Daughters of Charity, which is associated with the Vincentian Order, and two other nuns [Id.]. Seventeen faculty who belong to the Vincentian Order, Eastern Province, were not permitted to vote, even subject to challenge [Id.].

An election was conducted on December 17, 1975, in which the Lay Teachers Union prevailed by a plurality of more than 21. The Lay Teachers Union was thereafter certified as the representative of the following unit [A. 8a]:

All full time lay teaching faculty...employed by the Employer at its Niagara University, New York location excluding...religious faculty...

On February 10, 1976, the Employer University filed a petition for unit clarification seeking the inclusion of the four "religious faculty" who had been permitted to vote under challenge [A. 9a]; and, on April 8, 1976, the Employer University filed a motion seeking reconsideration of the Board's

previous exclusion of faculty members belonging to the Vincentian Order, Eastern Province [A. 9a].

The Employer University's motion for reconsideration was denied by the Labor Board in July 1976 [A. 24a].

In order to test the appropriateness of the unit, the Employer University refused to bargain with the Lay Teachers Union for such a unit excluding all "religious faculty." Accordingly, on June 7, 1976, the General Counsel of the Labor Board issued a complaint against the Employer University alleging its refusal to bargain with the Lay Teachers Union [A. 17a].

In its answer to the unfair labor practice complaint of June 15, 1976, the Employer University admitted its refusal to bargain and set forth two affirmative defenses [A. 22a]:

AS ITS FIRST AFFIRMATIVE DEFENSE:

Respondent alleges that the unit for which the Niagara University Lay Teachers Association has been certified is inappropriate on the basis of its exclusion of full-time faculty who are members of religious orders or communities.

AS ITS SECOND AFFIRMATIVE DEFENSE:

Respondent alleges that the issue concerning the appropriateness of the unit for which the Niagara University Lay Teachers Association has been certified is presently pending before the National Labor Relations Board in a petition for unit clarification in 3-UC-104 and a motion for reconsideration and clarification of unit in 3-RC-6410, and, therefore, has not been finally resolved before the National Labor Relations Board.

In July 1976, the General Counsel of the Labor Board moved for summary judgment on the refusal to bargain charge [A. 27a]. In November 1976, the Board granted the motion for summary judgment without having decided the pending unit clarification issue [A. 26a].

Thus, during all of the proceedings before the Labor Board and at the time the Petition for Review was filed herein, the certification of the Labor Board required the Employer University to bargain with a unit which excluded all "religious faculty."

The Employer University filed its Petition for Review in this Court on December 6, 1976.

The Labor Board's decision with respect to the unit clarification petition was issued on December 16, 1976 [A. 47a].

In the Niagara U. C. decision, the Labor Board held that the unit must include Vincentian Father Lachowski (from the New England Province of the Vincentian Fathers), Sister Gilman (whose order is affiliated with the Vincentian Fathers) and the two other nuns [A. 46a].

Accordingly, the Labor Board changed the year-long certification which had included only "lay" faculty and had excluded all "religious faculty" [A. 8a]. The Labor Board, however, continued to exclude "religious faculty who are members of the Congregation of the Mission, Eastern Province" [A. 47a].

THE FACTS

A. The Parties Before the Board(1) The Employer University

The Employer University is a private four-year coeducational university founded by the Congregation of the Mission* in 1856 [A. 49a]. It was chartered by the Regents of the University of the State of New York in 1883 [A. 51a, A. 54a] and at all times since then has been an educational institution of higher learning incorporated under and subject to the Education Law of the State of New York [A. 54a].

The University is governed by a Board of Trustees consisting of from six to twenty-five members "of whom not more than one-third shall be priests of the Congregation of the Mission generally referred to as the Vincentian Fathers" [A. 54a]. The only member of the Board of Trustees who is required to be a member of the Eastern Province of the Congregation of the Mission is the Provincial thereof, and he possesses no greater or lesser authority than any other member of the Board [A. 54a - 55a]. In fact, of the seventeen members of the Board, only five are members of the Congregation of the Mission [A. 3a].

Title to all the University's property is vested in the Employer and not in any religious or other entity [A. 3a,

* The terms "Congregation of the Mission"; "Vincentian Order"; and "Vincentian Fathers" are used interchangeably and refer to the worldwide group [A. 3a]. The worldwide group has provinces including the Eastern Province and the New England Province in the United States [A. 4a, 41a-42a].

RC Tr. 72, 102]. The control of such property is similarly vested in the Board of Trustees who, irrespective of their religious affiliations, are "subject to all the limitations and restrictions prescribed for colleges and universities by law or by the ordinances of the University of the State of New York" [A. 54a, RC Tr. 24].

(2) The Lay Teachers Union

The Lay Teachers Union is a labor organization which excludes from membership "religious full-time faculty" [RC Tr. 17]. In August 1975, it filed a Petition with the Labor Board for representation of the following unit [A. 1a]:

Included:

All full time lay teaching faculty including department chairmen employed by the Employer at its Campus, Located at Niagara University,

Excluded:

All part time faculty, all faculty who are members of religious orders...

Despite the fact that the Lay Teachers Union has consistently sought exclusion of "all faculty who are members of religious orders" and despite the fact that the Labor Board at all times prior to the filing of the Petition for Review to this Court excluded "religious faculty," the Lay Teachers Union agreed at the representation hearing that:

if the National Labor Relations Board were to find as an appropriate unit a group of faculty that included religious [the Union] would...then also admit those religious to membership [RC Tr. 18]

B. The Full-Time "Religious" Faculty Whom the Lay Teachers Union Sought to Exclude

The Regional Director found [A. 3a]:

The Employer, contrary to the Petitioner, would include employees who are members of a religious order...There are 124 regular full-time lay faculty and 21 regular full-time religious faculty. Eighteen of the latter are members of the Vincentian Fathers. *

Thus, the Union sought to exclude from the unit twenty-one individuals who teach subjects such as English, History, Political Science, etc., [Undergraduate Catalog, Jt. Exh. 1, p. 181 et seq.]** solely on the basis that they are members of religious orders. As indicated by the Regional Director, among those whom the Lay Teachers Union sought to exclude were 12 full-time faculty members who belong to the Vincentian Order, Eastern Province.***

* The Union sought to exclude five Vincentian Fathers as part-time faculty. The Regional Director did not determine whether these employees were full or part-time faculty because "their status as religious faculty excludes them from the unit." We have not and will not deal with the question of whether these five faculty members are full or part-time. We deal only with those who have been determined to be full-time employees.

** The faculty who are members of the "Congregation of the Mission" have the initials "C.M." at the end of their names [RC Tr. 87].

*** These faculty members will hereafter be referred to as "Eastern Vincentian faculty." Not included within the phrase "Eastern Vincentian faculty" is Vincentian Father Lachowski who belongs to the New England Province of the Vincentian Order. He shall be referred to as "Vincentian Father Lachowski" or "Father Lachowski."

The religious vows of Vincentian Father Lachowski from the New England Province of the Vincentian Order are identical to those of the Eastern Vincentian faculty [A. 4a; RC Tr. 123; UC Tr. 125]. In discussing the reasons for excluding all Vincentian faculty, including Vincentian Father Lachowski, the Regional Director stated [A. 4a]:

All Vincentian Fathers employed by the University take vows of poverty, obedience, chastity, and stability. These vows are simple and private rather than solemn and public but the effect of the vows is the same.

* * *

Father Lachowski is the Vincentian Father who is a member of the New England Province. The Vincentian Fathers is comprised of various Provinces all reporting to the Superior General of the Order. Father Lachowski has signed a written contract but like all religious faculty is not eligible for tenure. He along with the three nuns who are members of the faculty receives his paycheck directly. However, he has taken the same vows of poverty, obedience, chastity and stability, and although the record does not specifically reflect it, it would appear that his paycheck is returned to the Order.

After the Petition for Review was filed in this Court, Vincentian Father Lachowski was included within the unit as a result of the Niagara U. C. decision [A. 47a].

The Regional Director also excluded from the unit Sister Gilman, who is a member of the Order of the Daughters of Charity. Her religious vows are identical to those of the Eastern Vincentian faculty [A. 5a]. In his reasons for excluding her from the unit, the Regional Director found [A. 5a]:

The Daughters of Charity and the Vincentian Fathers were both founded by St. Vincent dePaul. The Daughters of Charity have the same rules of order as the Vincentians and they take simple and private vows of poverty, chastity and obedience. Further, the Daughters of Charity is under the jurisdiction of the Superior General of the Vincentian Order.

After the Petition to this Court, Sister Gilman was likewise included within the unit [A. 39a].

Finally, the two other nuns who were excluded are Sister Balthasar, of the Order of St. Francis, and Sister Minella of the Order of Our Lady of the Virgin Mary. They were also included in the unit by virtue of the Niagara U. C. decision [A. 39a].

C. The Full-Time Faculty at the Employer University, Including Eastern Vincentian Faculty

All full-time faculty members of the Employer University, irrespective of whether they are lay persons or members of religious orders, share a community of interest in wages and fringe benefits, hours and other terms and conditions of employment.

(1) Wages and Fringe Benefits

All full-time faculty members, irrespective of whether they are lay persons or members of religious orders, have the same wages and fringe benefits. Thus, all full-time faculty members, including Eastern Vincentian faculty, are under the same wage scale [RC Tr. 64, 65, 101]; are on the same payroll [RC Tr. 101]; are entitled to the same salary continuation

benefits [RC Tr. 35, 113, 114]; are entitled to the same sabbatical leave benefits [RC Tr. 33] and leave of absence [RC Tr. 33]; participate in the same banking service [RC Tr. 34, 35, 69]; credit union service [RC Tr. 35, 69]; and other insurance benefits such as medical [RC Tr. 35, 66] and life insurance [RC Tr. 35, 66].

(2) Hours of Employment

All full-time faculty members of the Employer University, irrespective of whether they are lay persons or members of religious orders are subject to the same requirements with regard to hours of employment. Thus, all full-time faculty, including Eastern Vincentian faculty, carry the same instructional load [RC Tr. 31, 32]; are required to observe the same classroom attendance policy [RC Tr. 33, 34]; must adhere to the University's policy of mandatory attendance at University functions [RC Tr. 33]; participate in registration of students [RC Tr. 32]; moderate student activities [RC Tr. 30]; and are subject to the same restrictions on outside work [RC Tr. 33].

(3) Other Terms and Conditions of Employment

All full-time faculty members of the Employer University, irrespective of whether they are lay persons or members of religious orders, including Eastern Vincentian faculty, are subject to the same terms and conditions of employment. All enjoy the same academic freedom [RC Tr. 31]; need the same credentials for appointment [RC Tr. 31]; are under common supervision

[RC Tr. 34, 35]; require the same skills [RC Tr. 39]; are subject to the same probationary period [RC Tr. 33]; are subject to the same promotion policy [RC Tr. 33]; follow the same procedures for ordering textbooks [RC Tr. 32, 33]; and utilize the same method of instructional discipline of students [RC Tr. 33].

(4) Interchangeability and Contact

To further highlight the commonality of interest which is shared by all full-time faculty members of the Employer University, irrespective of whether such faculty member is a lay person or a member of a religious order, there is complete interchangeability and the highest degree of sharing of the University's facilities between all full-time faculty, whether they wear religious garb or not. Thus, all full-time faculty members of the Employer University, including Eastern Vincentian faculty replace each other interchangeably [RC Tr. 29, 30]; are in constant daily contact with each other [RC Tr. 30]; share the same offices [RC Tr. 30]; utilize the same lounges [RC Tr. 32]; utilize the same bulletin boards [RC Tr. 32]; utilize the same secretarial services [RC Tr. 34]; and attend the same faculty meetings [RC Tr. 31].

The Regional Director, in recognition of the foregoing record facts found [A. 3a-4a]:

Religious and lay faculty have a common wage scale and working conditions. The probation,

leave, promotion, and academic freedom policies apply to them equally. They come in daily contact with one another and there has been temporary interchange between them. Further, they both are eligible for participation in the Employer's life insurance and retirement program.

The Regional Director further found, inter alia, that since all "religious faculty [are] not eligible for tenure" [A. 4a], and can be reassigned by their superiors [A. 4a; RC Tr. 96, 97, 119, 120; cf. UC Tr. 34-37, 129, 130, 221]; that since all Vincentian faculty, including Vincentian Father Lachowski (and Sister Gilman), take religious vows of poverty and obedience [A. 4a-5a]; that since Father Lachowski and the Eastern Vincentian faculty reside with other members of the Vincentian Order who are supervisors [A. 4a; cf. UC Tr. 133]; and that since Eastern Vincentian faculty (and Vincentian Father Lachowski [RC Tr. 60-61]) need approval for dismissal from the Order [A. 4a], that all "religious faculty" should be excluded from the bargaining unit. *

The Labor Board, in the Niagara U. C. decision, itself eliminated these factors as a basis for excluding religious faculty from the unit [A. 39a-47a]. With regard to tenure, it held that the fact that Vincentian Father Lachowski, Sister Gilman and the two other nuns did not receive tenure and certain other benefits would not preclude them from being in the unit [A. 45a]. Moreover, the Labor Board by mandating the inclusion

* As noted above, the Regional Director, while continuing to exclude all "religious faculty" from the unit, permitted Sister Balthasar and Sister Minella to vote subject to challenge [A. 5a].

of Vincentian Father Lachowski and Sister Gilman itself eliminated any distinction that could be made between the faculty included within the unit and the excluded Eastern Vincentian faculty. The Labor Board's decision which eliminated these matters will be discussed more fully, infra, pages 45 to 49.

Two factors, however, remain. The first may be relied upon by the Labor Board; the second will be relied upon by it.

First, the fact that the Eastern Vincentian faculty enter into oral as opposed to written employment contracts. However, as we will show, infra, pages 49 to 50, aside from the casuistic nature of this assertion, since a collective bargaining agreement supersedes any individual contract between an employer and employee, the absence of a written (or, indeed, any) contract by the Eastern Vincentian faculty is irrelevant.

Second, the disposition of the wages of the Eastern Vincentian faculty as a result of their vow of poverty. We underscore the word "disposition" because, as noted above, their wages are precisely the same as that of the lay faculty. It is this latter factor of disposition of the wages of the Eastern Vincentian faculty, and the Labor Board's application of its doctrine relating to religious vows set forth in Seton Hill College, 201 N.L.R.B. 1026 (1973), upon which the Labor Board rests its exclusion of the Eastern Vincentian faculty. We now turn to the Seton Hill case and the Labor Board's exclusive reliance thereon.

ARGUMENTSummary of Argument

We note at the outset that the application of Seton Hill by the Labor Board has been challenged not only in this Proceeding but is (on admittedly distinguishable facts) before the Court of Appeals for the Third Circuit in NLRB v. St. Francis of Loretto [Docket #76-2100].

In Seton Hill, the Order of the Sisters of Charity of Seton Hill held legal title to the buildings and grounds of the College. The College had a 99-year lease on the property. The rental was \$1 per year. The government and corporate powers of the College were vested in, and exercised by, a board of trustees consisting of not fewer than 20 nor more than 30 persons. Fifty percent of the membership of the board of trustees were Sisters of the Order. Based upon the foregoing, and its reliance upon the religious vows of obedience and poverty, the Labor Board excluded members of the Order of the Sisters of Charity of Seton Hill on the ground that a nun belonging to that Order:

is in a sense part of the employer since the order owns and administers the College. [201 N.L.R.B. at 1027]

The Labor Board's sole rationale for excluding Eastern Vincentian faculty, rests upon its current interpretation of Seton Hill, which it set forth in the Niagara U. C. decision as follows [A. 41a]:

There [in Seton Hill] the Board excluded from a faculty unit nuns who were members of the order that owned and operated the college. It predicated its result primarily on two grounds: First, it concluded that as the nuns were members of the order operating the college they were 'in a sense a part of the employer' which, especially in light of their vow of obedience, would place them as members of the bargaining unit in a position of conflicting loyalties and thus precluded their inclusion. Second, it held that their vow of poverty resulted in a divergence of economic interests between the lay faculty and themselves and thus the two groups had 'different interests.' [Emphasis supplied]

From the foregoing, it is manifest that the Labor Board considers "ownership and operation" to be inextricably intertwined with the religious vow of obedience. The Labor Board also hinges the remainder of its exclusion of Eastern Vincentian faculty upon the religious vow of poverty, which it likewise has, as we shall show, inextricably intertwined with "ownership and operation."

Standing alone, the Labor Board's reliance upon the religious vows of obedience and poverty rests upon a foundation which is undermined by the First and Fifth Amendments to the Constitution and the Civil Rights Act of 1964 (42 U.S.C. §2000c et seq.). More significantly, when considered in the light of the record herein, and the decisions of the Labor Board and the courts, it rests upon a foundation which must evaporate on strict scrutiny.

In Point I, we shall demonstrate that the Vincentian Fathers, Eastern Province, do not, as the Labor Board claims, own nor operate the Employer University.

With regard to ownership, there is nothing in the record to negate the Regional Director's finding that: "The University holds title to all the buildings and property on the campus" [A. 3a; emphasis supplied].

With regard to operation, there is nothing in the record to support a finding that the Vincentian Fathers, Eastern Province, "operate" the Employer University. All of the record evidence is to the contrary. Moreover, under its decision in D'Youville College, 225 N.L.R.B. No. 104, 92 L.R.R.M. 1578 (1976) the Labor Board itself has found that, under the record facts herein, there is no "ownership" or "operation" by a religious order. *

In Point II, we will show that the vow of obedience and the vow of poverty are irrelevant and in any event may not Constitutionally be considered.

The vow of obedience has been held by the Labor Board in the Niagara U. C. decision to relate solely to "matters of religion" [A. 43a]. Moreover, the identical vow (which is made solely to God) taken by Eastern Vincentian faculty is taken by Vincentian Father Lachowski and Sister Gilman (supra pages 11 to 12). The latter two were mandated by the Labor Board to be included within the unit.

* Accordingly, we have not and will not raise the issue as to whether the Labor Board has jurisdiction over religiously owned and operated schools. See e.g. Grutka v. Barbour, ___F.2d___, 94 L.R.R.M. 2584 (7th Cir. 1977).

Similarly, the vow of poverty relates solely to matters of religion and the right of the individual to dispose of his or her remuneration as he or she sees fit [A. 44a, 45a]. Here again, the identical vow (which is made solely to God) taken by the Eastern Vincentian faculty is taken by Vincentian Father Lachowski and Sister Gilman.

In Point III, we will make manifest that there is no difference in the community of interest between faculty members who happen to belong to the Vincentian Fathers, Eastern Province, and those faculty members which the Labor Board has included in the unit.

We respectfully submit that for the reasons set forth in each of Points I through III, the Labor Board's exclusion of Eastern Vincentian faculty is "arbitrary and unreasonable" and, therefore, must be overturned by this Court. See NLRB v. Solis Theatre Corp., 403 F.2d 381 (2d Cir. 1968).

We wish to note that all of the foregoing points relate to the exclusion by the Labor Board in the Niagara U. C. decision of "religious faculty, who are members of the Congregation of the Mission, Eastern Province." As indicated above, however, at the time the Petition for Review was filed, all "religious faculty" had been excluded by the Labor Board.

In Point IV, however, we will demonstrate that as a result of the Board's changing its certification subsequent to the filing of the Petition in this Court, the Employer University is not and cannot be held to be guilty of an unfair labor

practice. At all times prior to the Petition for Review, the Regional Director (who attempted to apply Seton Hill as originally written) with the concurrence of the Labor Board [A. 5a, 7a] excluded from the certification all "religious faculty" [A. 2a]. It was after the Petition for Review was filed in this Court, that the Labor Board, in an attempt to legitimize its acts changed the certification to include some "religious faculty."

At the outset, however, we wish to make it clear that we are respectfully requesting this Court to dispose of the substantive issues herein and not to rest solely upon our procedural defense.

More than a year and a quarter has elapsed since the election was held among lay faculty. Much of this delay can be attributed to the fact that it took the Labor Board eight months to recognize that at least some "religious faculty" were mandated to be in the unit. For if the Labor Board had decided the Niagara U. C. case first and had the fortitude to practice toward the Eastern Vincentian faculty what it preached in the Niagara U. C. case, we sincerely believe there would be no need for this Proceeding.

Nevertheless, the delay could have no effect other than to at least irritate the lay faculty at the Employer University who are being precluded from bargaining collectively because of the substantive issues herein. We do not desire that the consequent divisiveness be continued any longer than absolutely necessary.

POINT I

THE EMPLOYER IS OWNED AND OPERATED BY THE EDUCATIONAL CORPORATION WHICH IS NIAGARA UNIVERSITY. THE LABOR BOARD'S FINDING THAT THE EMPLOYER UNIVERSITY IS OWNED AND OPERATED BY THE VINCENTIAN FATHERS, EASTERN PROVINCE, IS ARBITRARY AND UNREASONABLE.

- A. The University is Owned by the Educational Corporation, Which is the Employer University, and Not By the Vincentian Fathers, Eastern Province

The Regional Director held that [A. 3a]:

The University holds title to all the buildings and property on the campus.

Thus, the Regional Director, whose finding was not disturbed by the Labor Board [A. 7a], found as a fact that "ownership" rests in the Employer University. Indeed, the Regional Director could have reached no other conclusion in light of the uncontradicted testimony that:

all the property of the university is held in title by the university corporation. That is without exception... [RC Tr. 102]

It will be recalled that in Seton Hill the Order of Sisters of Charity held legal title to the buildings and grounds of the College and rented the property to the College for 99 years at \$1 per year.

The Labor Board in the Niagara U. C. decision attempted to apply its decision regarding ownership in Seton Hill to the Employer University, and indicated that the Vincentian Order, Eastern Province, "owns" the Employer University [A. 46a]. The

height of its folly in so doing can be demonstrated by setting forth the findings of the Labor Board in Seton Hill and placing next to them the uncontrovertable findings of the Regional Director herein.

Labor Board's Finding in
Seton Hill

"The Order, which is incorporated, holds legal title to the buildings and grounds of the College."
[201 N.L.R.B. at 1026]

Regional Director's Finding
in Niagara

"The University holds title to all the buildings and property on the campus."
[A. 3a]

Accordingly, the attempt herein by the Labor Board to apply Seton Hill is directly contradicted by the record facts and the Regional Director's finding. As a matter of indisputable fact, it cannot be asserted that the Vincentian Fathers, Eastern Province, "own" the Employer University. We need say no more.

- B. The University is Operated by the Educational Corporation, Which is the Employer University, and Not By the Vincentian Fathers, Eastern Province

The Labor Board categorically stated in the Niagara U. C. decision [A. 41a]:

Niagara University is operated by the Vincentian Fathers, Eastern Province.

As a result of this assertion, we shall differentiate between the "Congregation of the Mission" on the one hand, and the "Vincentian Fathers, Eastern Province" on the other.

This is not a casuistic distinction. Indeed, it is mandated by the Labor Board's holding in the Niagara U. C. case

"requiring" the inclusion in the unit of Vincentian Father Lachowski of the New England Province of the Congregation of the Mission and Sister Gilman of the Daughters of Charity, which is affiliated with the Congregation of the Mission [A. 46a]. By so holding, the same panel of the Labor Board which decided the unfair labor practice case put itself into a position where it had to either create a new distinction or admit it had wrongly decided the refusal to bargain charge. In refusing to take the latter course, as we will now show, it forced itself to go from the ridiculous to the sublime.

The Employer University is a private four-year coeducational university founded by the Congregation of the Mission in 1856 [A. 49a]. It was chartered by the Regents of the State of New York in 1883 [A. 51a, 54a] and at all times since 1856 has been an educational institution of higher learning, incorporated under and subject to the Education Law of the State of New York [A. 54a].

The Employer University is governed by a Board of Trustees consisting of not "less than six nor more than twenty-five [members], of whom not more than one-third shall be priests of the Congregation of the Mission generally referred to as the Vincentian Fathers" [A. 54a; emphasis supplied]. Only one trustee of the "not more than one-third [who] shall be priests of the Congregation of the Mission" is required to be from the Eastern Province [A. 54a]. Of the seventeen members of the Board of Trustees, only five belong to the Congregation of the Mission [A. 3a].

Members of the Board of Trustees, irrespective of their religious affiliations, are "subject to all the limitations and restrictions prescribed for colleges and universities by law or by the ordinances of the University of the State of New York" [A. 54a]. Thus, the Statutes of the Employer University provide that the "powers of the Trustees shall be deemed powers of the University" [A. 55a] and further provides, in part, as follows:

By virtue of the provisions of the charter granted and amended by the Regents of the University of the State of New York and by virtue of section 226 [formerly section 68] of the Educational Law of the State of New York, the Board of Trustees of Niagara University is vested with all the powers, privileges and duties and subject to all the limitations and restrictions prescribed for colleges and universities by law or by the ordinances of the University of the State of New York. [A. 54a]

The Regional Director, in recognition of many of the foregoing facts, specifically found [A. 3a]:

Niagara University is governed by a seventeen-member Board of Trustees, of whom not more than one-third shall be priests of the Congregation of the Mission generally referred to as the Vincentian Fathers. At the present time, five members of the Board, including the Chairman, are members of the Vincentian Fathers. Further, the Provincial of the Congregation of the Mission, Eastern Province of the United States is required by the University statutes to be an ex-officio member of the Board. [Emphasis supplied]

Thus, under the finding of the Regional Director, not only is the Employer University "governed" by the Board of Trustees, but only one trustee (of the "not more than one-third") is

required to be a member of the Vincentian Fathers, Eastern Province, viz., the Provincial thereof.

Based upon the foregoing, the Labor Board's decision in D'Youville College, 225 N.L.R.B. No. 104, 92 L.R.R.M. 1578 (1976) becomes dispositive of the fact that neither the Congregation of the Mission nor its Eastern Province operates the Employer University.

To illustrate that the lack of control even by the Congregation of the Mission in the operation of Niagara University is no more than that found by the Labor Board in D'Youville, we will now quote the Labor Board's conclusion in D'Youville and add as parenthetical matter the facts and record citations applicable to the Employer University [92 L.R.R.M. at 1578-9]:

To be sure, D'Youville College [Niagara University] was founded by the Order of Grey Nuns [Congregation of the Mission, A. 49a]. However, around 1970 [1883; A. 51a], the college was reorganized as a corporation under the laws of the State of New York [Id.]. At that time, a board of trustees was established and vested with ownership of the Employer's buildings and other property and given responsibility to establish the policy and to administer the affairs of the college [A. 54a-57a]. It is specified by the corporate charter that no more than one-third of the members of the board of trustees may be members of religious orders, including the Order of Grey Nuns [Congregation of the Mission; A. 54a]. Consequently, there is no basis for holding in this proceeding that the four nuns [Eastern Vincentian faculty] are in any manner affiliated with the employer except in their capacity as faculty members signing a standard employment contract [entering into oral employment contracts; RC Tr. 74].

It is manifest from the foregoing that with regard to "operation", the situation involved in D'Youville is identical

to that involved in Niagara, even if the larger body (viz., the "Congregation of the Mission") rather than the smaller body (viz., "Eastern Province") were involved. Accordingly, the Labor Board's own decision in D'Youville (which it cites with approval in the Niagara U. C. case [A. 46a]) is controlling since the Labor Board is obligated to follow its own precedent in cases indistinguishable on the facts. As stated in NLRB v. Mall Tool Co., 119 F.2d 700, 702 (7th Cir. 1941):

Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board's powers.
[Citations omitted]

See also this Court's recent decision in Kenston Trucking Co. v. NLRB, 544 F.2d 1165 (2nd Cir. 1976).

Indeed, when it is recalled that the Labor Board, by its own tortured reasoning, had to limit its unsupported claim of "ownership and operation" to the Eastern Province (only one member of which need be on the Board of Trustees), the words "arbitrary and unreasonable" hardly seem strong enough.

Accordingly, the Labor Board's basis for claiming "conflicting loyalties" against Eastern Vincentian faculty is unsupportable. There is no evidence, much less the required substantial evidence to support the Labor Board's assertions of ownership and operation; therefore, the Board's conclusion must be overturned by this Court. NLRB v. Solis Theatre Corp., 403 F.2d 381 (2d Cir. 1968). See also Amalgamated Clothing

Workers of America v. NLRB, 491 F.2d 595 (5th Cir. 1974).

Moreover, as we will now demonstrate, the Labor Board's reliance on religious vows to support its claim of "conflicting loyalties" is not only unsupportable but is unconstitutional and unlawful as well.

POINT II

THE LABOR BOARD'S RELIANCE UPON THE VOWS OF OBEDIENCE AND POVERTY, WHICH RELATE TO RELIGIOUS MATTERS, IS IN VIOLATION OF THE CONSTITUTION AND THE CIVIL RIGHTS ACT AND THEREFORE IS ARBITRARY AND UNREASONABLE. IN ADDITION, THE EXCLUSION OF THE EASTERN VINCENTIAN FACULTY WHO TAKE THE SAME VOWS AS "RELIGIOUS FACULTY" WHO ARE INCLUDED WITHIN THE UNIT IS ARBITRARY AND UNREASONABLE.

The guarantee of "equal protection of the laws" contained in the Fourteenth Amendment is implicit in the Fifth Amendment Due Process Clause and, thus, applicable to Federal agencies as well as to the States. Bolling v. Sharpe, 347 U.S. 497 (1954).*

* There can be no question that the Employer University has standing to raise the claim that the Labor Board's action violates the First and Fifth Amendment rights of the Eastern Vincentian faculty. The Employer University, of course, has standing to contest the appropriateness of the bargaining unit. The Supreme Court consistently has held that parties properly before the Court can raise the concomitant rights of third parties where it is difficult for the third parties to assert their own rights, see, e.g., Eisenstadt v. Baird, 405 U.S. 438, 446 (1972); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958), or where the third-party rights would be diluted or adversely affected if the government action is upheld. Craig v. Boren, 45 U.S.L.W. 4057, 4058-59 (U.S., Dec. 20, 1976); Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Barrows v. Jackson, 346 U.S. 249, 257 (1953). See generally Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974). Moreover, the limitations on the litigant's assertion of jus tertii are not constitutionally mandated, but stem from a rule of self-restraint designed to prevent unnecessary decisions on Constitutional issues. Craig v. Boren, supra.

[Footnote continued]

Accordingly, there is a "suspect" classification necessitating the closest judicial scrutiny by this Court where, as here, the Labor Board distinguishes between (a) "lay faculty" and "religious faculty," or (b) "religious faculty" of one religious province and "religious faculty" from other orders or provinces.

The Supreme Court has mandated "that classifications based upon alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971). And we submit that religion, which is specifically mentioned in the First Amendment, is just as, if not more than, entitled to such "close judicial scrutiny." See NAACP v. Button, 371 U.S. 415, 438

[Footnote continued]

The Employer University is the only party who can properly raise these Constitutional issues in this Court. The Labor Board's certification decisions are reviewable in the context of an unfair labor practice proceeding against the employer for refusal to bargain collectively. See American Federation of Labor v. NLRB, 308 U.S. 401 (1940).

These Constitutional issues are squarely presented in this review of the Labor Board's unfair labor practice finding, since the validity of the Employer University's refusal to bargain collectively with the Lay Teachers Union turns on the appropriateness of the bargaining unit certified by the Board. Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941). Indeed, employees excluded from the bargaining unit are not parties to such proceedings, nor are they entitled as a matter of right to intervene in them. 29 U.S.C. §160(b); Semi-Steel Casting Co. v. NLRB, 160 F.2d 388 (8th Cir. 1947), cert. denied, 332 U.S. 758. This inability of individual employees to raise these issues is further manifested by the Labor Board's decisions in D'Youville, supra, and the Niagara U. C. case which held that the employer and the union by stipulation can agree to include or exclude "religious faculty" [D'Youville, 92 L.R.R.M. at 1579; Niagara U. C. (A. 46a)].

(1963). Indeed, as stated by the Supreme Court in Wisconsin v. Yoder, 406 U.S. 205, 215 (1972):

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Accord: Roemer v. Board of Public Works of Md., 426 U.S. 736, 746 (1976).

There can be no question that there is a total absence in this Proceeding of "those interests of the highest order" which are essential "to overbalance legitimate claims to the free exercise of religion." The Labor Board has so held in D'Youville College, 225 N.L.R.B. No. 104 (1976). In D'Youville the Labor Board admitted to a unit of full-time faculty "religious faculty" who, as we have shown, (supra pages 23 to 28) were in no different a position than the Eastern Vincentian faculty. In permitting the inclusion of the nuns in D'Youville, the Labor Board stated [92 L.R.R.M. at 1579]:

Nevertheless, where as here the parties themselves are satisfied that there is a sufficient community of interest to justify including the religious in the same unit with the lay faculty and also where as here no statutory or other overriding policy consideration exists precluding such inclusion, we can perceive no reason for not accepting the agreement of the parties to such an all-faculty unit. [Emphasis supplied]

We fail to perceive how any "statutory or other overriding policy consideration" can constitutionally be dependent

upon the agreement of an employer and a union. *

The First Amendment mandates that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." It is axiomatic that what Congress is prohibited from doing by "law," the Labor Board may not do by its decisions. See e.g. Brinkerhoff Co. v. Hill, 281 U.S. 673, 680 (1930); see also Fay v. Douds, 172 F.2d 720 (2d Cir. 1949). Similarly, what employers and unions are prohibited from doing by anti-discrimination laws, the Labor Board may not legitimize by its decisions.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq., prohibits discrimination based on "religion" by employers and unions. With regard to unions, it provides in Section 2000e-2(c) as follows:

(c) It shall be an unlawful employment practice for a labor organization

- (1) to exclude or to expel from its membership, or otherwise to discriminate against any individual because of his race, color, religion, sex or national origin;
- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise affect his status as an

* In this connection, it is interesting to note that the Lay Teachers Union agreed at the representation hearing that:

if the National Labor Relations Board were to find as an appropriate unit a group of faculty that included religious [it] would...then also admit those religious to membership [RC Tr. 18, 136].

employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin.
[Emphasis supplied]

The term "religion" is defined in Section 2000e, as follows:

(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief...
[Emphasis supplied]

Thus, under the Civil Rights Act, the Lay Teachers Union could not, inter alia, exclude from its membership any of the Eastern Vincentian faculty or limit their rights of participation in the Union. Nevertheless, the Labor Board by certifying a unit which excludes faculty members because of their "religious observance and practice" is seeking to place its stamp of approval upon such a violation of the Civil Rights Act and is, by its Cross Petition, seeking to place this Court in the position of being an accomplice to religious discrimination.

The Labor Board cannot justify its actions under the guise of performing its function of determining the appropriate unit. The Labor Act and the Civil Rights Act must be read in pari materia; neither act was designed to preempt the other, Dobbins v. Local 1212 IBEW, 292 F.Supp. 413, 446-7, (D.C. Ohio 1968); cf. U.S. v. ILA, 460 F.2d 497 (4th Cir. 1972), cert. denied, 409 U.S. 1007.

Accordingly, the performance by the Board of its labor relations function cannot legitimize its perpetuation of violations of the Civil Rights Act.

We will now apply the foregoing principles to the Labor Board's decision herein.

- A. The Vow of Obedience Taken by the Eastern Vincentian Faculty Has Been Recognized by the Labor Board to Relate Solely to "Matters of Religion." The Labor Board's Reliance On the Vow is Therefore Arbitrary and Unreasonable.

As indicated in our Summary of Argument, the Labor Board in the Niagara U. C. case interpreted its decision in Seton Hill as follows [A. 41a]:

There [in Seton Hill] the Board excluded from a faculty unit nuns who were members of the order that owned and operated the college. It predicated its result primarily on two grounds: First, it concluded that as the nuns were members of the order operating the college they were 'in a sense a part of the employer' which, especially in light of their vow of obedience, would place them as members of the bargaining unit in a position of conflicting loyalties and thus precluded their inclusion...

Thus, it is manifest that the Labor Board considers the religious vow of obedience to be inextricably intertwined with "ownership and operation." We have demonstrated that there is no "ownership and operation" by the Vincentian Fathers, Eastern Province and, therefore, the vow of obedience has no relevance. In addition, since if the vow to God of obedience is an unconstitutional consideration, the vow cannot, in any event, be used by the Labor Board to support its claim of "conflicting loyalties."

As we shall now show, the Labor Board, by its own words, has manifested that the vow of obedience does not (and we submit, cannot Constitutionally) be considered as a factor herein.

In the Niagara U. C. decision the Labor Board found [A. 43a]:

Also, we believe it is of some consequence to note that the testimony in this record is consistent to the effect that the obligations under the vow of obedience are concerned with matters of religion and not with the individuals' professional conduct as a professor, or with their activities with respect to labor or other professional organizations. There is no contrary evidence. In short, we can perceive no basis for concluding that the religious vow of obedience, ipso facto, as the Union seems to argue, requires exclusion of the religious faculty in the issue from the unit. [Initial emphasis supplied; footnotes omitted].

The Labor Board further stated [A. 42a]:

As indicated in Seton Hill, the Board considered the vow of obedience of the clerical professors with respect to the order that owned and operated the college. Here we have found that the vows of Father Lachowski and Sister Gilman are in a sense too remote to the Vincentians, Eastern Province, to come within that category. As for Sister Balthasar and Sister Minella, they are members of orders [footnote reference omitted] unrelated to the Vincentians. [Emphasis supplied]

The vows that were taken by Vincentian Father Lachowski and Sister Gilman, who were included within the unit are identical to those taken by the excluded Eastern Vincentian faculty (See pages 11 to 12, supra).

Yet, the Labor Board disregards the vow of obedience of Vincentian Father Lachowski and Sister Gilman, but relies on that vow to exclude the Eastern Vincentian faculty.

It takes much less than "strict scrutiny" to condemn the Labor Board's reliance upon a vow of obedience taken by Eastern Vincentian faculty. That vow is made to no mortal but solely

to God [RC Tr. 117]. And the Labor Board has held the vow to be concerned solely "with matters of religion." To turn the Labor Board's very own words against it [A. 43a]:

we can perceive no basis for concluding that the religious vow of obedience, ipso facto, as the Union [Labor Board] seems to argue, requires [permits!] exclusion of the religious faculty in the issues herein [Eastern Vincentian faculty]...

In the bluntest terms, "matters of religion" must remain "matters of religion" irrespective of whether they are "too remote" or are considered proximate. As such, they cannot be considered by the Labor Board. This is required by the Civil Rights Act (supra, pages 31 to 32) and by the Constitution.

Indeed, the decision of the Labor Board is nothing less than a blatant and impermissible invasion upon religious freedom which correlatively excessively entangles the Labor Board in religious matters which are solely between the individual and God. See e.g., Roemer v. Board of Public Works of Md., 426 U.S. 736 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972).

In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh Day Adventist was denied state unemployment compensation benefits for refusing to work on Saturday. In holding that such a denial was violative of her freedom of religion, the Court stated [at 404]:

For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'
Braunfeld v. Brown, supra, at 607. Here not only is

it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

The Court continued [at 410]:

...South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.' Everson v. Board of Education, 330 U.S. 1, 16. [Emphasis supplied]

It is apparent from the Supreme Court's unequivocal language that it will not tolerate any governmental restraint that has the effect of penalizing an individual or a group because of their religious beliefs and practices. See also, Torasco v. Watkins, 367 U.S. 488 (1961), where the Court held that the denial of a commission to a notary public, because he would not declare his belief in God, was a violation of the First Amendment because it unconstitutionally invaded the individual's freedom of belief or non-belief in religion.

In light of the foregoing, it is respectfully submitted that the Labor Board's reliance upon the vow of obedience is an unlawful infringement upon the statutory and Constitutional rights of the Eastern Vincentian faculty and is, therefore, arbitrary and unreasonable.

Accordingly, the vow of obedience taken by the Eastern Vincentian faculty does not and cannot furnish any support for the Labor Board's claimed "conflict of loyalties" irrespective of whether there is "ownership and operation" by the Eastern Province. In any event, as we have shown there is no such "ownership and operation" by that Province.

We would only add that the incongruous and contradictory position in which the Labor Board has placed itself as a result of its reliance upon religious vows as a basis for excluding some clerics and including others is, in itself, a vivid demonstration of the folly of civil authorities trespassing into religious matters.

B. The Labor Board's Reliance on the Vow of Poverty is Self-Contradictory and Unconstitutional and is Therefore Arbitrary and Unreasonable

The Regional Director in excluding all Vincentians from the unit relied on the religious vow of poverty stating [A. 4a]:

Under his vow of poverty, a Vincentian Father has a right to ownership but can not use the property without the permission of his superiors. All monies earned by the Vincentian Fathers are given to their Provinces and they in return receive a monthly personal allowance. Further, the members of the Order are provided with food, clothing and shelter by their Provinces.

In its discussion in the Niagara U. C. decision relating to the vow of poverty, the Labor Board stated [A. 43a, 44a]:

As noted previously, the second basis for excluding the religious faculty in Seton Hill College was related to the vow of poverty taken by them. Here, Father Lachowski and the three sisters involved have also taken that vow. However, in this case, unlike

in Seton Hill, we find that this vow does not establish a separate community of interest between the lay and religious faculty.

The Labor Board, in discussing the four religious faculty members involved (including Vincentian Father Lachowski and Sister Gilman, who take the same religious vows of poverty as do the Eastern Vincentian faculty, supra, pages 11 to 12) appeared to realize that the vow of poverty taken by faculty members could not be considered and was of no relevance to the determination of an appropriate unit.

We respectfully request that this Court, while reading the following statements of the Labor Board, consider the appropriateness and applicability of the following words of the Labor Board to all individuals, including Eastern Vincentian faculty.

The Labor Board, in the Niagara U. C. decision, stated [A. 44a, 45a]:

In short, we do not believe that the way a person chooses to spend his or her money is a relevant consideration with respect to questions of unit placement.

In further explanation of the foregoing, the Labor Board stated [A. 45a, n.6]:

The alleged pertinence of questions on how money is spent seems in part to rest on an unstated and unproven assumption that a desire for income is somehow related to the particular manner in which it is spent; i.e., on how much it is needed. The whole concept here is at best a morass with which this Board has no special expertise to deal. Furthermore, it is beside the point. To take an example, an independently wealthy lay professor would not be excluded from a unit simply because

he or she did not 'need' the income or had no interest in a pay raise. [Emphasis supplied]

Finally, the Labor Board in the Niagara U. C. case specifically held that the Regional Director erred in considering matters relating to the vow of poverty stating [A. 45a, n.7]:

In view of this conclusion, we find that the Hearing Officer erred in overruling the objections to his own questions concerning what the religious faculty here involved did with their salary checks, except to the extent such questioning was limited to whether they returned all or part of their salary to the Employer. However, in the circumstances, the error was, as we have held above, nonprejudicial. We also wish to note here that questions concerning how the fathers and sisters arrange for the purchase of their habits, shoes, and any or all other personal items are irrelevant and involve personal matters of no proper concern of this Board. [Emphasis supplied]

Thus, from this language it appears that the Labor Board has recognized that all members of religious orders including Eastern Vincentian faculty, possess an interest in wages from the standpoint of self-support and the support of others. Indeed, logic dictates that as the salary of full-time faculty, including Eastern Vincentian faculty, increases more money is available to them for their own sustenance, as well as any other endeavor they may choose to contribute.

Incredibly, despite the broad, sweeping language used by the Board in condemning any consideration of the manner in which a person chooses to dispose of his salary, the Board restricted its application only to Vincentian Father Lachowski, Sister Gilman and the two other nuns involved in the Niagara U. C. decision. The Labor Board, however, continued to rely on the vow of poverty with respect to the Eastern Vincentian faculty. In

doing so, the Board relied upon phantom distinctions rather than concede that its initial affirmance of the Regional Director's decision was a total error. The Board stated [A. 44a]:

In the Seton Hill case, the nuns' salary was paid directly to their order. In turn, the order paid most of it over to the college, which the order also owned and operated. The sisters themselves received only a living allowance. As a result of this arrangement, the sisters could have no real interest in the size of their salaries, for ultimately those salaries amounted to little more than accounting transactions on the college's books. However, Father Lachowski and the sisters here concerned each receive the paychecks from the University and all but Sister Minella send them to their superiors and receive in turn a living allowance. [Footnote omitted]

Thus, the two factors relating to the vow of poverty used by the Board to distinguish the Eastern Vincentian faculty from other religious faculty are: (1) the Eastern Vincentian faculty did not receive their salary checks directly but rather had their salaries assigned directly to their Province, and (2) the Vincentian Order, Eastern Province, to which the excluded faculty belong, contributed a gift to the Employer University. We respectfully submit that these are specious distinctions.

(1) The Regional Director expressly found with regard to all Vincentians, including Father Lachowski, that: "All monies earned by the Vincentian Fathers are given to their Provinces" [A. 4a]. Vincentian Father Lachowski, Sister Gilman, and one of the two other nuns who were included in the unit receive individual salary checks and then forward the checks to their respective Provinces or Orders who use it for the support

of their members and for other charitable purposes [A. 44a].*
Whereas Father Lachowski, Sister Gilman, and another nun perform the "ministerial" act (pun intended) of receiving checks and consistently signing them over to their Provinces or Orders, the Eastern Vincentian faculty have their remuneration sent directly from the Employer University to their Province.

The Labor Board's distinction (between transmission on the one hand, and direct assignment, on the other) is clearly an attempted distinction based completely on form rather than substance, a practice this Court has recently condemned. Kenston Trucking Co. v. NLRB, 544 F.2d 1165 (2d Cir. 1976).

Finally, the method of payment to the Eastern Vincentian faculty is identical to the method of payment to the Grey Nuns in the D'Youville College case [Reg. Dir. Dec. No. 3-RC-6498, Dec. 23, 1975]. As noted above, the Labor Board included the Grey Nuns in the unit therein. [225 N.L.R.B. No. 104, 92 L.P.R.M. 1578 (1976)]**

(2) The fact that the Vincentian Order, Eastern Province, made a charitable gift to the Employer University is also irrelevant.

* The third nun keeps what she needs for support from her salary check and forwards the balance to her order.

** The Labor Board has, in other cases also, held that the method of payment of employees is not dispositive in unit determinations; Palmer Manufacturing Corp., 105 N.L.R.B. 812 (1953), and a mere difference in the method of payment does not warrant exclusion from a unit; Century Electric Co., 146 N.L.R.B. 232 (1964); Armour & Co., 119 N.L.R.B. 122 (1957).

The Labor Board, in speaking of Vincentian Father Lachowski and the three nuns stated [A. 44a]:

...the excess of their [Father Lachowski and the three nuns] expenses goes to support the various activities of their own orders which include care for the sick and retired members, and, in the case of Father Lachowski, maintenance of a preparatory school for indigent boys.

Nevertheless, the Labor Board excludes Eastern Vincentian faculty because their Province paid for their living expenses [RC Tr. 109, 115], retained some of the money, and donated a gift to Niagara University [RC Tr. 134].

The record further indicates that lay faculty members also donated gifts of money to the Employer University [RC Tr. 134]. Neither the lay faculty nor the Vincentian Order, Eastern Province, were under any compulsion to make such gifts. It was probably for this reason that the Regional Director did not even mention the gifts when he excluded the religious faculty.

Moreover, it is significant that in the D'Youville College case, the Labor Board included in the unit members of the religious order therein who deducted their living expenses "with the remainder being returned by way of a gift to their employer" [92 L.R.R.M. at 1579].

In any event, the inquiry into religious beliefs and practices of prospective members of a unit by the Labor Board is an impermissible consideration since it invades the religious freedom of those individuals. Indeed, the Constitution

mandates that the manner in which "religious faculty" dispose of their salaries can be of no concern to the Labor Board.

In Lemon v. Sloan, 340 F.Supp. 1356 (E.D.Pa. 1972), aff'd. 413 U.S. 825 (1973), reh.denied, 414 U.S. 881, a three judge District Court held unconstitutional a state statute providing for reimbursement of tuition paid by parents who send their children to nonpublic schools. The Court, however, found it improper to take into consideration the disposition of the salaries of any employee, stating [340 F.Supp. at 1363 n.7]:

[T]here is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members.

In so holding, the three judge Court in Lemon indicated its acceptance of Hysong v. Gallitzin Borough School District, 164 Pa. 629, 30 A. 482 (1894), which involved the question of whether a public school could employ Catholic nuns to teach secular subjects since the nuns had taken a vow of poverty and turned over their salaries to their church. The Pennsylvania Supreme Court ruled that the nuns could not be dismissed for these reasons, stating [at 483-4]:

Nor does the fact that these teachers contributed all their earnings beyond their support to the treasury of their order, to be used for religious purposes, have any bearing on the question. It is none of our business nor that of these appellants, to inquire into this matter. American men and women, of sound mind and 21 years of age, can make

such disposition of their surplus earnings as suits their own notions. We might as well, so far as any law warranted it, inquire of a lawyer before admitting him to the bar, what he intended to do with his surplus fees, and make his answer a test of admission. What he did with his money could in no way affect his right to be sworn as an officer of this Court. Therefore, it would be impertinence in us to inquire.

Thus, almost a century of precedent prohibits the Board from inquiring into the disposition of the salaries of "religious faculty."

Accordingly, there is no basis for distinguishing the Eastern Vincentian faculty from the religious faculty members included in the units in the Niagara U. C. case and in D'Youville with respect to the vow of poverty. Nevertheless, the Labor Board, despite its condemnation of considering the manner in which faculty members choose to dispose of their salaries, has refused to "practice what it preaches." In doing so, its actions have been inconsistent and self-contradictory as well as in violation of the Constitutional rights of the Eastern Vincentian faculty.

Finally, since there is no ownership or operation by the Eastern Province, the Labor Board's reliance on the vow of poverty is just as irrelevant as its unfounded reliance on the vow of obedience.

POINT III

EASTERN VINCENTIAN FACULTY SHARE A COMMUNITY OF INTEREST WITH THOSE INCLUDED IN THE UNIT CERTIFIED BY THE BOARD; THEREFORE THE BOARD'S REFUSAL TO INCLUDE THEM IS ARBITRARY AND UNREASONABLE

While the Act does not provide specific standards for making unit determinations, such criteria have been developed by the Board over the years with the result that "first and foremost is the principle that mutuality of interest in wages, hours and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit." Continental Baking Company, 99 N.L.R.B. 777, 782 (1952).

Applying the foregoing to the facts in the instant proceeding mandates the inclusion of Eastern Vincentian faculty who share a community of interest with the lay faculty and with the four religious faculty included within the unit by the Labor Board.

The Regional Director found that [A. 4a]:

Religious and lay faculty have a common wage scale and working conditions. The probation, leave, promotion, and academic freedom policies apply to them equally. They come in daily contact with one another and there has been temporary interchange between them. Further, they both are eligible for participation in the Employer's life insurance and retirement program.

Thus, the Regional Director recognized that the wages, hours, and other terms and conditions of employment are mutual in interest. As we have already indicated, this conclusion is furthered by the record [supra, pages 12 to 14].

In the Niagara U. C. decision, the Labor Board itself in summarizing its reasons for including Vincentian Father Lachowski and the three nuns, held, with the exception of a few differences which it found not to be dispositive, that [A. 46a]:

...their terms and conditions of employment are, insofar as the record indicates, identical to those of the lay faculty.

Among the differences which the Labor Board found not to preclude the inclusion of Vincentian Father Lachowski and the three nuns was the fact that they, like all religious faculty, including the Eastern Vincentian faculty, do not receive tenure. The Labor Board, in discussing tenure and participation in other benefits of employment, stated [A. 45a-46a]:

Finally, in support of the claim that a marked difference in community of interest separates the lay faculty and the four religious faculty members here involved, attention is directed by the Union to the facts that this religious faculty is not tenured and does not participate as does all the lay faculty in the Employer's retirement plan, and that two of them are not covered by the health plan covering the lay faculty. These differences do appear to be related to the religious faculty being members of orders. Thus, it appears the orders provide security and care in retirement and thus make other retirement arrangements for their members unnecessary. However, as important as these matters may be, they are hardly the whole or even an overwhelmingly large part of the employment situation, and they indicated little more than a diversity of immediate interests that would be found in any unit, such as one combining young and old employees. Certainly, alone they are insufficient to support a conclusion that the religious faculty cannot properly be included in the same unit with the lay faculty. [Emphasis supplied]

Again, with regard to, inter alia, the possibility of reassignment of the religious faculty, the Labor Board held:

Despite the lack of relationship to the order owning and operating the college, the Union seems to take the position that the vow of obedience disqualified all these members of the religious faculty from inclusion in the unit. In support of this position, it points to testimony which it claims shows that Superior in each order---the case of Sister Minella excepted---must approve employment at Niagara and must be consulted [sic] with respect to contract renewals and 'can resign [reassign(?)] religious faculty members.' The evidence is less than clear concerning the degree of control the Superiors have over the members of their orders. In any event, we deem such matters irrelevant here, for we fail to see why an individual's reasons for accepting, renewing, or resigning employment is a pertinent consideration with respect to their unit placement while employed. [A. 42a, 43a; Emphasis supplied]

The record manifests that all of the religious faculty could be "reassigned" by their superiors at any time [RC Tr. 96, 97, 119, 120; UC Tr. 34-37, 129, 130, 221]. In this connection, however, it should be noted that the process for reassignment among all religious, including Eastern Vincentian faculty, is a consultative one and that the superiors of all of the religious orders involved will consult with the individual to determine whether he or she desires such reassignment. [Id.]

The foregoing holdings by the Labor Board in the Niagara U. C. case become especially significant when they are applied to the only distinctions relied upon by the Regional Director with regard to the Eastern Vincentian faculty. The Regional Director stated [A. 4a]:

...the Vincentian Fathers of the Eastern Province, unlike the lay faculty, do not sign a written contract

and are not eligible for tenure. They can be reassigned by their superiors at any time and approval for dismissal must come from the Order. They reside on campus and share living quarters with other Vincentian Fathers who are supervisors within the meaning of the Act.

With regard to tenure and reassignment, as we have just demonstrated, the Labor Board has determined that these matters do not prevent the inclusion of Vincentian Father Lachowski and the three nuns in the unit. As to these factors, the Eastern Vincentian faculty are in the identical position to the four religious faculty members included in the unit.

With regard to approval for dismissal* and the fact that Vincentians reside together, such factors are similarly shared by Vincentian Father Lachowski, who was included in the unit [A. 41a, UC Tr. 133]. See: U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973), where Justice Douglas in his concurring opinion stated [at 541] that persons have a right to associate and reside together for, inter alia, religious purposes; see also, NAACP v. Alabama, 357 U.S. 449, 460 (1958).

Indeed, because of the inclusion of Vincentian Father Lachowski and the three nuns in the unit, the Labor Board in the Niagara U. C. decision did not even discuss the above four

* Not only does the finding that the Vincentian Order must approve the dismissal of a member of the order apply to Father Lachowski as well as other Vincentians, but fair reading of the testimony [RC Tr. 60-1] manifests that the witness, who was a layman, in an attempt to be overly cooperative was answering hypothetical questions, and concluded by stating, "I'm not sure. I am not a member of the order. I don't know the procedure." [RC Tr. 61]

factors in continuing to exclude the Eastern Vincentian faculty.

The only remaining factor relied upon by the Regional Director was his attribution of significance to the fact that the Eastern Vincentian faculty do not sign written contracts but entered into oral contracts. [RC Tr. 74]. Aside from a Statute of Frauds question (which probably would not arise in contracts for the academic year) we know of no difference between a written and oral employment contract. Moreover, since a collective bargaining agreement supersedes any individual contract between an employer and employee, the absence of a written (or, indeed, any) contract by the Eastern Vincentian faculty is irrelevant. As the Supreme Court observed in J. I. Case v. NLRB, 321 U.S. 332, 338 (1944):

The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment. [Emphasis supplied]

Accordingly, once the individual is included within the unit it is the collective bargaining agreement which controls his employment regardless of any individual agreement (written, oral, or non-existent) with the employer.*

* It is interesting to note that one of the very claims by the Board to support its refusal to bargain decision is that the lay faculty were requested to sign written agreements [A. 32a]

In light of the foregoing, no valid basis exists for distinguishing between the Eastern Vincentian faculty and the faculty members included in the unit.

Thus, there is no difference regarding wages, hours and other terms and conditions of employment between Eastern Vincentian faculty and the other faculty who were included within the unit. Accordingly, this case is unlike Nazareth High School v. NLRB, __F.2d__ (2d Cir. 1977; No. 76-4076) wherein this Court found that "members of the religious faculty are paid substantially less than the lay faculty" and held that "the exclusion of a group of employees because of substantial variance in pay scale was a proper exercise of discretion." [Slip decision, n.3].

Indeed, to again turn the words of the Labor Board in the Niagara U. C. case against the Board, the types of distinctions sought to be drawn to exclude the Eastern Vincentian faculty [A. 45a]:

are hardly the whole or even an overwhelmingly large part of the employment situation, and they indicate little more than a diversity of immediate interest that would be found in any unit, such as one combining young and old employees. [Emphasis supplied]

The Labor Board, therefore, has recognized that it would have to condemn the Niagara Young Teachers Union, which excluded senior citizens. It would likewise have to condemn the Niagara Male Teachers Union, which excluded women. United States Baking Co., 165 N.L.R.B. 951 (1967).

More significantly, where Constitutional rights are involved, this Court would have to exercise strict scrutiny and find far more compelling reasons than those sought to be asserted by the Labor Board herein. Thus:

This Court would be required to condemn the Niagara University White Teachers Association, which excluded blacks*; the Niagara University American-Born Teachers Association, which excluded all foreign-born**. And it must likewise condemn the Niagara University Lay Teachers Association which sought to exclude all clerics and continues to exclude Eastern Vincentian faculty.

In Roemer v. Board of Public Works, 426 U.S. 736 (1976) the Supreme Court, in permitting state aid to certain church-related colleges, held that clerics may not be discriminated against in governmental employment. The Court held (at 746, n.13):

It could scarcely be otherwise, or individuals would be discriminated against for their religion, and the Nation would have to abandon its accepted practice of allowing members of religious orders to serve in the Congress and in other public offices.

The teaching of Roemer is that when a cleric is employed in the same capacity as a layman, the cleric cannot Constitutionally be discriminated against.

* Brown v. Board of Education, 347 U.S. 483 (1954).

** Graham v. Richardson, 403 U.S. 365 (1971).

Again, as stated by the Supreme Court in Wisconsin v. Yoder, 406 U.S. 205, 215 (1972):

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

See also cases cited supra pages 28 to 31.

The Labor Board simply has not shown any distinction between the Eastern Vincentian faculty and those it mandated to be in the unit to "overbalance legitimate claims to the free exercise of religion."

It is respectfully submitted that the very basis for refusing "separate but equal" for public school students based on race precludes "separate but equal" for faculty members based on religion. For, if there were a Niagara University Lay Teachers Union and also a Niagara University Religious Vincentian Teachers Union, and one group had advantages in employment over the other, the courts would, under "strict scrutiny" or otherwise, require the merger of those unions. And the possibility of the Lay Teachers Union seeking such advantages is not a fanciful one. Indeed, the Labor Board has indicated that a union representing lay faculty could seek to negotiate to exclude religious faculty members from performing any bargaining-unit work (i.e., teaching). Seton Hill College, 201 N.L.R.B. 1026, 1027, n.3 (1973). This is unlawful.

In United States v. ILA, 460 F.2d 497 (4th Cir. 1972), cert.denied, 409 U.S. 1007, the Court found a per se

violation of Title VII where blacks were prohibited from joining an all white local and were thus forced to maintain their own segregated local. Since, as here, all the employees "possess equal abilities and are capable of doing the same work," [at 499] the Court held that the maintenance of segregated locals could not be justified by a "separate but equal" doctrine. The Court stated [at 500]:

We agree with the district judge that the maintenance of racially segregated locals inevitably breeds discrimination that violates the Act. Racial segregation limits both black and white employees to advancement only within the confines of their races. The position that would rightfully be an employee's, but for his race, may be filled by a person of lower seniority or inferior capability because the job traditionally has been reserved for either a white person from one local or a black person from the other. Even though union officials strive in good faith to administer their duties impartially, they cannot avoid this inherent inequality, and its consequent violation of the Act. Indeed, so obvious is the discrimination that arises from segregated unions, in every case, save one, courts have ordered or approved mergers. [Citations omitted; the sole exception cited by the Court was later reversed sub nom EEOC v. International Longshoreman's Ass'n, 511 F.2d 273 (5th Cir. 1975)].

Accordingly, we respectfully submit that this Court cannot condone the Labor Board's putting asunder what this Court is required to join together.

POINT IV

THE EMPLOYER UNIVERSITY IS NOT GUILTY OF A REFUSAL TO BARGAIN SINCE THE UNIT SET FORTH IN THE CERTIFICATION OF THE LABOR BOARD, UPON WHICH THIS PROCEEDING IS BASED, IS, AND HAS BEEN HELD BY THE BOARD TO BE INAPPROPRIATE

Throughout the entire refusal to bargain proceeding before the Labor Board, the certified unit was [A. 2a]:

All full time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York location excluding office clerical employees, religious faculty, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act. [Footnotes omitted, emphasis supplied]

The Employer University has, since the decision of the Regional Director in October 1975, used every available procedure to have all of its full-time faculty members included within the unit, including "religious faculty."

Thus:

(1) After the Regional Director's decision which excluded all "religious faculty," the Employer University requested review of that decision by the Labor Board. It was rebuffed by the Labor Board [A. 7a].

(2) The Employer University sought to have the Board reconsider the exclusion of all "religious faculty" [A. 11a]. It was rebuffed by the Labor Board [A. 24a].

(3) The Employer University sought to have the unit clarified so as to eliminate the exclusion of all "religious

faculty" [A. 11a]. At all times prior to the filing of the Petition for Review herein the Employer University was rebuffed by the Labor Board [A. 24a].

(4) The Employer University sought to have the Unfair Labor Practice proceeding held in abeyance until after the unit was clarified and thereby proceed in the proper manner. Thus, in its answer to the Unfair Labor Practice complaint, the Employer University set forth as an affirmative defense [A. 22a]:

Respondent alleges that the issue concerning the appropriateness of the unit for which the Niagara University Lay Teachers Association has been certified is presently pending before the National Labor Relations Board in a petition for unit clarification in 3-UC-104 and a motion for reconsideration and clarification of unit in 3-RC-6410, and, therefore, has not been finally resolved before the National Labor Relations Board.

The Employer University was again rebuffed by the Labor Board [A. 26a].

It is indisputable that the only reason that the Employer University refused to bargain with the Lay Teachers Union was due to the Board's failure to include religious faculty.

Indeed, the Unfair Labor Practice complaint issued by the Board alleges [A. 19a]:

Respondent, by letters dated May 5, 1976 and May 10, 1976, addressed to the Union, declined to meet, recognize or bargain with the Union on the ground that the Certification of the Regional Director, on behalf of the Board, on December 29, 1975, was inappropriate since it excluded the religious faculty from the unit.
[Emphasis supplied]

In its answer to the foregoing complaint, the Employer University alleged as its first affirmative defense [A. 22a]:

Respondent alleges that the unit for which the Niagara University Lay Teachers Association has been certified is inappropriate on the basis of its exclusion of full-time faculty who are members of religious orders or communities. [Emphasis supplied]

The Unfair Labor Practice decision and order of the Labor Board, which is the technical basis of this proceeding, denied the foregoing defense and concluded [A. 33a]:

Accordingly, we find that the Respondent has, on April 12, 1976, and May 5, 1976, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. [Emphasis supplied]

Thus, the very basis of the proceeding in this Court is that the Employer University refused to bargain with the representatives of what the Labor Board then considered to be "the appropriate unit" viz., the unit which excluded all "religious faculty," including Vincentian Father Lachowski and the three nuns.

It was only after the Employer University took the initiative and filed the Petition for Review in this Court, that the Labor Board issued the Niagara U. C. decision. Amazingly, in that decision and order, the Labor Board agreed that the Employer University had been right, at least in part, throughout the entire period. Accordingly, the Labor Board changed the certification, which the Employer University had refused

to honor, so as to delete the exclusion of all "religious faculty" and to mandate the inclusion of Vincentian Father Lachowski and three other "religious faculty" in the unit.*

It is manifest from the foregoing that the refusal of the Employer University to bargain was in furtherance of its attempt to test the certification and was a "technical 8(a)(5) [case], i.e., where Respondent is testing a Board certification." [N.L.R.B. Case Handling Manual, §10282.1 (1975)].**

Astoundingly, however, as a result of the procedure followed by the Labor Board, it found that the Employer University refused to bargain for a unit which the Labor Board itself acknowledged to be inappropriate. Under these circumstances, the Employer University cannot be considered to have refused

* The certification now provides that the Lay Teachers Union is the certified representative of the following employee unit [A. 47a]:

All full-time teaching faculty including department chairmen employed by the Employer at its Niagara University, New York, location, excluding office clerical employees, religious faculty who are members of the Congregation of the Mission, Eastern Province, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act. [Emphasis supplied]

** Except in extraordinary cases, such a refusal to bargain is the ordinary method of testing the validity of a Board unit certification. Indeed, in United Federation of College Teachers, Loc. 1460 v. Miller, 479 F.2d 1074 (2d Cir. 1973), this Court held [at 1075]:

Review is ordinarily permitted only after the N.L.R.B. enters a final order in an unfair labor practice proceeding in reliance on its resolution of the certification proceeding...

to bargain until it violated the certification issued by the Labor Board one week after the Petition for Review was filed herein. See, General Electric Co. v. NLRB, 412 F.2d 512, 520-1 (2d Cir. 1969) where this Court held that an employer does not violate the Act by refusing to bargain during a period in which the Employer is not obligated to bargain.

It would have taken extraordinary clairvoyance for the Employer University to perceive what the Labor Board would ultimately do. The situation in which the Employer University has been placed is reminiscent of the situation in Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). In that case, a state supreme court sought to legitimize a public assembly ordinance which clearly had been unconstitutionally broad. The Supreme Court recognized that the petitioner therein (just as the Employer University herein) could not have anticipated the restrictive interpretation placed upon the ordinance by the state court (and placed upon the original certification excluding all "religious faculty"). We will now quote from the decision in Shuttlesworth and, by including parenthetical factors, indicate the cogency of the following remarks of the Court [at 156]:

It would have taken extraordinary clairvoyance for anyone to perceive that this language [the original certification] meant what the Supreme Court of Alabama [the Labor Board] was destined to find that it meant more than four years [one year] later; and, with First Amendment rights hanging in the balance, we would hesitate long before assuming that...the petitioner [the Employer University] possessed any such clairvoyance at the time [it refused to bargain].

We respectfully submit that as a result of the procedure followed by the Labor Board, it has precluded any finding that the Employer University is guilty of a refusal to bargain charge for the simple reason that the Employer University has not violated a proper certification.

Nevertheless, we respectfully request this Court to determine the substantive issues in this Proceeding.

The Labor Board's procrastination could have no other effect than to at least irritate the lay faculty at the Employer University who are being precluded from bargaining collectively because of the substantive issues herein. We do not desire that the consequent divisiveness be continued any longer than absolutely necessary.

CONCLUSION

For the foregoing reasons, the Employer University respectfully requests that this Court direct the Labor Board to delete its exclusion of full-time Eastern Vincentian faculty from the unit and enter a judgment (a) granting the Employer University's Petition to Review and Set Aside the Labor Board's Order and (b) denying the Cross Petition of the Labor Board for Enforcement of its Order.

Respectfully submitted,

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On the Brief

March 11, 1977

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing Brief on Behalf of Petitioner Niagara University has this day been served by first-class mail upon the following Counsel for Respondent at the address listed below:

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Herbert D. Schwartzman, Esq.

Dated: Queens, New York
March 11, 1977

